

HEAVY TRAFFIC AT THE INTERSECTION OF MORTGAGE FORECLOSURE AND BANKRUPTCY LAW

Mortgage foreclosure law is focused primarily on the enforcement of the bargain made by a creditor and a debtor, after default. Bankruptcy law, on the other hand, is focused primarily on the twin goals of giving the honest debtor a fresh start, and equal treatment of all creditors. As the U.S. Supreme Court has stated, the general philosophy of the bankruptcy laws is "to give the [honest but unfortunate] debtor a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."¹ "A co-equal purpose of the bankruptcy laws is to promote equality of treatment among creditors similarly situated."² Frequently, these goals of bankruptcy law cannot be accomplished without some modification of the pre-bankruptcy debtor-creditor relationship.

Given the inherent tension between the state law rights of creditors under mortgage foreclosure law, and a bankruptcy law designed to give relief to debtors, it is no surprise that the intersection of these two bodies of law has spawned a considerable amount of decisional law. Many of these cases are efforts by the courts (primarily bankruptcy courts) to reconcile the state law rights of foreclosing secured creditors, and the policies underlying these rights, with the federal law rights of bankrupt debtors and their other creditors, often represented by a bankruptcy trustee. Vermont has had its own unique experience in this regard, owing primarily to the substantive and procedural intricacies of its foreclosure laws, which retain strict foreclosure as the primary method for foreclosure of mortgages. Under current law, unless a mortgage contains a power of sale clause and one party to the action requests a sale in its pleadings, a judicial foreclosure must proceed in Vermont as a strict foreclosure.³ Since the debtor's rights after default under Vermont law are limited to the contingent equitable right to redeem by satisfying the mortgage debt in full,⁴ and failure to

redeem results in the loss of any equity value in the property over and above the mortgage debt, bankruptcy is frequently the tool of last resort for preservation of the debtor's equitable interest in the property. Not surprisingly, numerous issues arise in connection with such efforts, such as when the debtor's equitable interest is cut-off under state law such that a bankruptcy filing cannot revive it, whether defects in the foreclosure process allow a debtor or trustee to exercise greater rights than state law would allow, and whether the forfeiture of surplus value in the property through strict foreclosure can be remedied in bankruptcy under fraudulent transfer statutes.

The last several years have seen significant developments in regard to all of these issues, the most recent of which has called into question the validity of any title derived through strict foreclosure in the last four years.⁵ This article discusses those developments and the current state of the law, including pending legislation designed to revise strict foreclosure so that it does not run afoul of the restrictions imposed by fraudulent transfer laws.

Using Bankruptcy as a Means to Stay Foreclosure and Save Equity

As a result of two bankruptcy court decisions in the mid-1980's,⁶ it was considered well-settled in this jurisdiction until 2002 that if a bankruptcy filing was made before the debtor's period of redemption under a foreclosure decree expired, the running of the redemption period would be stayed automatically under 11 U.S.C. § 362(a) upon the filing, until such time as the stay was modified or terminated. The result of this was to give debtors the opportunity effectively to extend the period for redemption by a bankruptcy filing, since a creditor would have to go to the bankruptcy court for relief from the automatic stay—often a time consuming and costly process. The stay also gives the

trustee in a Chapter 7 liquidation case an indefinite time within which to sell the property to recoup any value in excess of the debt,⁷ or the debtor in a Chapter 13 individual reorganization case the chance to avoid the foreclosure (on a principal residence) entirely and cure the default under a Chapter 13 plan.⁸

Although the bankruptcy court's decision in *LH&A Realty* was contrary to three prior federal appeals court decisions, its holding was not subjected to appellate challenge until 2002, in the case of *In re: Canney*,⁹ another case involving a creditor's effort to obtain relief from stay. In *Canney*, the Second Circuit overruled *LH&A Realty* and held that the automatic stay in bankruptcy does not stay the running of the redemption period under a foreclosure decree. The Court interpreted Section 362(a) narrowly to apply only to affirmative actions by a creditor. The Court reasoned that since complete title vests in the foreclosing creditor upon expiration of the redemption period as a matter of law, with no action needed by the creditor to perfect its title as to the debtor/mortgagor, the section 362 stay cannot apply. Instead, according to *Canney*, section 108(b) of the Bankruptcy Code controls, giving the trustee only an additional sixty days after the filing of the petition within which to act.

Canney clarified that forfeiture of the debtor's remaining equitable interest in the property, and vesting of complete title in the creditor, takes place automatically upon expiration of the period of redemption, notwithstanding the fact that Vermont law requires a creditor to file in the land records a certified copy of the foreclosure decree within thirty days of the expiration of the redemption period. Thus, as between the creditor and the debtor, the foreclosure is complete upon expiration of the redemption period. As between the creditor and "subsequent purchasers, mortgagees, or attaching creditors," the creditor must record the certified foreclosure decree¹⁰ within the thirty day statutory period or prior to the

attachment of additional liens, or take title subject to a right of redemption in favor of subsequent lienholders.¹¹ But in any event, under *Canney* the automatic stay does not prevent a foreclosing creditor in any circumstances from recording the decree in the land records, thereby perfecting title as against any interests attaching thereafter.¹²

Canney does not address whether an extended right of redemption could exist if a creditor fails to record a foreclosure judgment within the thirty days after redemption deadlines under a decree have passed, after which a bankruptcy filing occurs. Even though a trustee in a Chapter 7 case would not be in a position to assert a derivative redemption right of the debtor—which expires according to *Canney* upon entry of the foreclosure decree—the trustee would be in a position to assert the status of a hypothetical judicial lien creditor who obtains a lien on the debtor’s property at the time of the bankruptcy filing, under 11 U.S.C. § 544(a).¹³ There is no reason a trustee in such a position could not assert a right of redemption under 12 V.S.A. § 4530 as a subsequent attaching creditor. While it is hard to envision a Chapter 7 trustee wishing or being in a position to exercise such a right in most cases—for that requires payment of the mortgage debt in full—the existence of significant equity value in the property could provide an impetus for doing so in cases where assets are available to the trustee. There may be additional incentives for a Chapter 13 trustee to assert such redemption rights because of the additional rights to cure mortgage defaults given to Chapter 13 debtors with respect to their principal residences.

Special Chapter 13 Redemption Rights for Principal Residences

In 2002, following the *Canney* decision, the U.S. District Court for the District of Vermont decided *In re Taylor*,¹⁴ a Chapter 13 case in which the debtor had filed her petition within days prior to the expiration of her redemption deadline in a strict foreclosure decree. The bankruptcy court had ruled that under *Canney* the debtor’s right to redeem had expired when she failed to redeem within the extended time allowed by 11 U.S.C. § 108(b), preventing her from seeking to reinstate the mortgage under her Chapter 13 plan. The District Court reversed, finding that 11 U.S.C. § 1322(c)(1) creates a separate federal

right to cure a mortgage default on a principal residence that can be exercised so long as the debtor’s state law right to redeem had not expired prior to the bankruptcy filing.

In 2004, the bankruptcy court again waded into these issues in *In re: Cavacas*,¹⁵ a Chapter 13 case in which all redemption deadlines had expired under a foreclosure decree before the Chapter 13 filing, but the clerk of the Superior Court had erroneously issued a Certificate of Non-Redemption before the redemption deadline for a junior lienholder had expired. The debtor argued that this defect in the state procedure preserved the debtor’s rights under 11 U.S.C. § 1322 to cure the mortgage default, but the court rejected this argument. The court found the defect in the state court process immaterial, reasoning that the crucial question was whether the creditor’s title to the property had been unified pre-bankruptcy by the expiration of all redemption rights of the foreclosure defendants. Because this had occurred, the court concluded that the debtor’s right to cure under Section 1322 had expired pre-bankruptcy, leaving the debtor with no further interest in the property.

The *Cavacas* decision highlights that these issues can become more complex when there are multiple defendants in the foreclosure action, and a series of redemption deadlines for the defendants. Each defendant is customarily given an additional one or two days to redeem after the mortgagor, in reverse order of lien priority. The mortgagor/debtor could fail to redeem, but the mortgagee’s title is not fully unified or perfected until all other rights of redemption have expired upon the failure of other lienholders to redeem. According to *Cavacas*, the debtor’s Section 1322 rights are not cut-off until all of the redemption rights under the foreclosure decree have expired, and the mortgagee’s title is thereby unified. Thus, where there are multiple defendants, even if the debtor’s right to redeem has expired, the debtor, under *Cavacas*, could invoke the protection of Section 1322 and seek to cure the default under a plan by filing for protection any time before the expiration of the last redemption deadline under the decree.

Under the rationale of *Cavacas*, a Chapter 13 trustee would be in a position to assert that the debtor’s Section 1322 rights have not been cut-

off whenever a foreclosing creditor has failed to perfect its title as to subsequent attaching creditors by failing to record a certified copy of the judgment within the time required by state law, before a bankruptcy filing.¹⁶ *Cavacas* ties the continuation of the debtor’s rights under Section 1322 to the final unification of the foreclosing creditor’s title under state law. But this does not occur until all redemption deadlines have expired, and the timely recording of the decree in the land records have extinguished the rights of subsequent attaching creditors. The debtor in *Cavacas* attempted to raise the Chapter 13 trustee’s rights as a subsequent attaching creditor, but the court found the issue to be premature because the creditor still had time, in the court’s view, to exercise its statutory right to record the decree. Nevertheless, the court acknowledged that the Chapter 13 trustee might have an interest or right in the property if the mortgagee failed to record the foreclosure decree in a timely fashion.

As a result of these decisions, there are at least three possible scenarios where, even though a foreclosure decree has issued, a Chapter 13 filing may be a viable option for preserving a Section 1322 right to cure a default: (1) the debtor’s right to redeem has not expired before the bankruptcy filing; (2) the debtor’s right to redeem has expired but other junior lienholders named in the decree still have a right to redeem; or (3) all deadlines to redeem under a foreclosure decree have passed, but the creditor has not recorded the decree within thirty days of the last redemption deadline or otherwise before some other lien attaches to the property, before the bankruptcy case is filed. Obviously, this puts a premium on a prompt title search by debtor’s counsel as to any residential property that is in foreclosure, but which the mortgagor hopes to protect with a Chapter 13 filing. Even if the mortgagor has lost its state law right to redeem, under *Cavacas*, the Section 1322 right to cure may still be viable if other lienholders have remaining time to redeem, or if the foreclosing creditor does not record the decree in a timely fashion.

Defective Mortgages and the Bankruptcy Code

In contrast to the line of decisions involving Chapter 13 cases where the debtor’s right to cure under

Section 1322 lives on until the very end of the foreclosure process, a line of cases involving efforts to avoid defective mortgages provides greater protection to mortgagees' rights. Defective mortgages are vulnerable to avoidance in bankruptcy because a debtor or trustee has the power under the so-called strong-arm clause of the Bankruptcy Code, 11 U.S.C. § 544(a)(3), to exercise the rights of a bona fide purchaser of the property, "without regard to any knowledge of the trustee or of any creditor." Vermont law requires that mortgages be witnessed and acknowledged,¹⁷ and deeds lacking these elements are not binding on subsequent purchasers.¹⁸ In a 2002 Chapter 13 case, *Mortgage Lenders Network v. Sensenich (In re: Potter)*, three levels of federal courts and the Vermont Supreme Court all weighed in on the issue whether the trustee's avoidance powers survive the recording of a mortgage foreclosure complaint based on a defective mortgage and the issuance of a foreclosure decree.

Both the bankruptcy court, and the district court in a first level appeal, ruled in favor of the trustee, concluding that, as a matter of state law, the filing of a foreclosure complaint based on a defective mortgage could not "cure" the defect in the mortgage such that the trustee's rights as a bona fide purchaser would be defeated.¹⁹ The Second Circuit, finding that Vermont law provided no clear answer to this question, certified to the Vermont Supreme Court the question whether the recording of the foreclosure complaint based on a defective deed is sufficient to cut-off the rights of bona fide purchasers.

The Vermont Supreme Court found it necessary to reformulate the certified question because not only had the mortgagee recorded the complaint, but a foreclosure decree had been entered before the bankruptcy filing.²⁰ The Supreme Court found this factor to be dispositive, concluding that issuance of an unappealed foreclosure decree based on a foreclosure complaint properly recorded provides inquiry notice of the mortgage's validity.²¹ According to the Court, the final decree established the validity of the mortgage, since it had not been challenged in that action, so all parties, including subsequent purchasers, were bound by that decree under 12 V.S.A. § 4523(b). After the case was returned to federal court, the appellate rulings in favor of the lender

led to a settlement of the lender's claim in the Chapter 13 case.

Can the Vermont Supreme Court's decision in the *Potter* case be reconciled with the *Taylor* and *Cavacas* line of cases as to when a foreclosing mortgagee's rights are perfected to the point they cut off a trustee's rights under Section 544? Under the Vermont Supreme Court's *Potter* decision, when the issue is whether the trustee's strong-arm power under Section 544(a)(3) can be exercised to void a defective mortgage, the cut-off point is issuance of a foreclosure decree (so long as the complaint was recorded). But when the issue is at what point in the foreclosure process is the debtor's Section 1322 right to cure cut off, as in *Taylor* and *Cavacas*, the *Cavacas* decision arguably requires the foreclosing creditor to complete the additional step of recording the foreclosure decree in the land records, as required by 12 V.S.A. § 4529-4530, before the right to cure is completely cut off. Although in *Cavacas* the creditor prevailed because all redemption deadlines had expired prior to the Chapter 13 filing, the court left open the issue whether a failure by the creditor to record the decree in a timely fashion could result in the acquisition of hypothetical judicial lien rights by the trustee under Section 544, thus potentially extending the debtor's Section 1322 rights to cure.²² And since the *Cavacas* court tied the expiration of the debtor's Section 1322 rights to the unification of the foreclosing creditor's title through the foreclosure process, and recording of the foreclosure decree is the last step required to perfect the mortgagee's title against subsequent attaching creditors, it follows logically that until this last step is completed, the debtor's right to cure could be invoked.

Two factors could explain this apparent inconsistency in the law as to how and when the foreclosure process cuts off rights that could arise under bankruptcy law in relation to residential mortgages under Chapter 13. First, *Potter* dealt with a trustee's claim aimed at voiding a creditor's mortgage entirely, even though the debtor had no such right under state law, a result even the Second Circuit recognized would be harsh.²³ The *Taylor* line of cases, in contrast, dealt with the much less harsh remedy of allowing a debtor to cure a mortgage default under a plan and reinstate the mortgage, despite a prior state court foreclosure decree. The Vermont Supreme Court may

have been reluctant in *Potter* to apply Vermont foreclosure law in such a way as to enable bankruptcy to upset a validly issued Vermont foreclosure decree, in the interest of protecting the finality of Vermont foreclosure decrees and the titles derived from them. A second distinction may be that *Potter* dealt with whether a trustee could be a bona fide purchaser without notice under Section 544(a)(3), whereas the *Taylor* line of cases did not deal with constructive notice issues. The constructive notice issues addressed in *Potter* arise not only in the context of bankruptcy filings during the post-judgment phase of a foreclosure, but also in a variety of other contexts not involving bankruptcy. Thus, the Vermont Supreme Court's *Potter* decision can be viewed as the Court's effort to resolve a constructive notice issue consistently with the Court's view of the importance of finality of judgments, while giving only secondary consideration to the bankruptcy policies underlying the trustee's strong arm powers.

Strict Foreclosures as Fraudulent Transfers

A third area of recent tension between mortgage foreclosure and bankruptcy law has arisen in the context of a Chapter 13 trustee's challenge to strict foreclosure as a fraudulent transfer. In *Sensenich v. Molleur (In re: Chase)*,²⁴ the bankruptcy court held that a transfer of real estate via a strict foreclosure may be avoided as a fraudulent transfer, under certain circumstances. Unlike transfers that occur via public foreclosure sale, a strict foreclosure transfer is not entitled to an automatic presumption that reasonably equivalent value was received for the property, as enunciated by the U.S. Supreme Court in *BFP v. Resolution Trust Corp.*²⁵ Because the nature of strict foreclosure is such that foreclosing mortgagees can in some instances recover property worth significantly more than the mortgage debt, the bankruptcy court concluded that these transfers must be reviewed on a case by case basis to determine if reasonably equivalent value is given by the mortgagee to the mortgagor when the mortgagee obtains title.

The court in *Chase* also recognized that its decision had serious implications for the "compelling state interest" in the stability of real estate titles obtained through strict foreclosure. Because of this important interest, and the lack of

any definition of the term “reasonably equivalent value” in Vermont’s fraudulent transfer statute,²⁶ the Court established a scheme of evidentiary presumptions to be used to determine the issue of reasonably equivalent value in individual cases. This issue is determined by comparing the fair market value of the property at the time of the foreclosure transfer to the outstanding debt obligation at that time. Where the debt is not more than 70 percent of the property’s fair market value on the date of transfer, the transfer is presumed to be avoidable as a fraudulent transfer. Where the debt is at least 90 percent of the property’s fair market value, the opposite presumption applies. For transfers that fall in between these two benchmarks, the Court must decide the issue on a case by case basis, looking at the totality of the circumstances, including a listing of factors set forth in the decision.²⁷ Even where an evidentiary presumption applies it is rebuttable, again with reference to the totality of the circumstances.

Applying these standards to the transfer involved in that case, the *Chase* court deemed the transfer to be fraudulent because there was an approximately \$40,000 surplus of value over the debt that was owed by the mortgagor (\$111,000). The Court later ruled that the foreclosing lender was entitled to set-off its reasonable litigation expenses against its liability to the trustee.²⁸

As a result of the *Chase* decision, any property with a foreclosure in the chain of title could be subject to fraudulent transfer challenge if the mortgagor files a bankruptcy petition within four years of the foreclosure transfer.²⁹ This has called into serious question the continuing viability of strict foreclosure, except in those cases where there is clearly no value in the property in excess of the debt. Foreclosing mortgagees must now pay much closer attention to the fair market value of property under foreclosure, and are well advised to opt for foreclosure by sale in any case where there is arguably any significant value in excess of the debt.

Chase also calls into question the validity and insurability of titles obtained through strict foreclosure in the last four years, since any such transfer is subject to attack in the event of a foreclosure filing by the mortgagor that has lost title through strict foreclosure. To make matters worse, because Vermont law requires no valuation of property in

strict foreclosure, in many cases it may be very difficult to reconstruct property values in the past, particularly given the recent movements in real estate values.

Because of these concerns, the Legislature is now considering amendments to Vermont’s fraudulent transfer law and strict foreclosure law to address these problems.

Legislative Response to Chase Decisions

At this writing, there is pending in the Legislature a bill sponsored by Representative Mark Young of Orwell, proposing amendments to both the Vermont fraudulent transfer law and the strict foreclosure law. H. 766 was passed by the House on March 3, 2006, and is currently before the Senate Judiciary Committee.

H.766 would make one simple change to the fraudulent transfer law. It adds to the list of exempt transfers set out in 9 V.S.A. § 2292(e) “foreclosure of a mortgage in compliance with [the mortgage foreclosure law].” Enforcement of Article 9 security interests is already exempt under Section 2292(e)(2), and foreclosure of a mortgage would be equally exempt under the bill.

The more significant statutory revisions proposed in the bill are revisions to the strict foreclosure law aimed at correcting the deficiencies identified in the *Chase* decision that subject strict foreclosure to scrutiny as a fraudulent transfer. Two significant changes are proposed. First, Section 4531 of Title 12 would be amended to provide that any party to a foreclosure action can request, or the court on its own motion can order, a foreclosure sale, whether or not the mortgage contains a power of sale clause. Second, Section 4528 of Title 12 would be amended to provide that no decree of strict foreclosure can issue without an explicit court finding that there is no substantial value³⁰ in the property in excess of the mortgage debt, plus unpaid taxes due on the property. This provision, if enacted, would require mortgage holders to provide the court with reliable evidence of the property’s value in any case where strict foreclosure is sought. Under the bill, Section 4528 would still provide for a six month period of redemption, unless shortened by court order. However, other language would be added that arguably requires the court in each case to fix the redemption period by

reference to certain enumerated factors, including the existence of value in the property over and above the debt owed to all lienholders, the extent of any assessed but unpaid property taxes, the condition of the property, and any other equities. This should relax the standard for shortening the redemption period to less than six months where these factors favor a shorter period.

If enacted, H.766 will insulate strict foreclosures from fraudulent transfer challenges made by bankruptcy trustees or debtors under Vermont law, as all properly conducted strict foreclosures will qualify for the statutory safe harbor under 9 V.S.A. § 2292(e). Strict foreclosures would not have the same statutory protection from challenge under the federal fraudulent transfer law. Nevertheless, the *Chase* decision indicates that the Court would apply the same analysis of the *BFP* presumptions to state and federal fraudulent transfer law, and would find a strict foreclosure law, as amended by H.766, to be entitled to the same presumptions as a foreclosure by public sale.

H.766 contains no provisions making it effective as to existing foreclosure actions or any actions completed before its enactment. Thus, absent addition of such provisions to the law, any pending strict foreclosure transfer is subject to a *Chase* fraudulent transfer challenge, unless the foreclosing party has clearly documented and preserved evidence that the mortgage debt exceeds the value of the property. Moreover, even if a bill like H.766 is enacted, strict foreclosure transfers already completed will remain at risk of challenge if the mortgagor ends up in bankruptcy within four years of the transfer.

Conclusion

As we have seen, the process for reconciliation of the tensions between state mortgage foreclosure law and federal bankruptcy law continues to evolve. Recent decisions have clarified when mortgage foreclosure law cuts off certain rights from preservation in bankruptcy, while at the same time, those decisions place a premium on compliance with statutory requirements by creditors to ensure that bankruptcy cannot revive redemption rights that would not exist under state law alone. Until the Vermont Legislature takes some action to amend the strict foreclosure law, that method of foreclosure will have very limited value,

given the risks it now carries of a later challenge to title. Great care must be taken by any mortgagee that now wishes to avail itself of the advantages of strict foreclosure, and in the future Vermont's strict foreclosure law will have to be narrowed substantially if this method of foreclosure is to be preserved in the state for those cases in which the law of fraudulent transfers will permit it to operate.

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¹ Lines v. Frederick, 400 U.S. 18, 19 (1970).

² In re Arnold, 255 B.R. 845, 852 n. 12 (Bankr. W.D. Tenn. 2000).

³ VT. STAT. ANN. tit.12, § 4531a(a). Non-judicial foreclosure by sale has been an alternative since the amendments to the foreclosure law in 1994, but it cannot be used with residential property or farmland, as to which judicial foreclosure is the only alternative. VT. STAT. ANN. tit.12, § 4531 a(b).

⁴ This right to redeem is an interest in property that becomes part of the bankruptcy estate along with the debtor's other non-exempt assets. In re Cavacas, 2004 WL 1661008 (Bankr. D.Vt. July 22, 2004). Since a bankruptcy trustee is charged with protecting and preserving this property for the benefit of all creditors, once a bankruptcy filing takes place, both the debtor and the debtor's other creditors have an interest in the protection of the value of the debtor's redemption rights.

⁵ This particular development is one of several significant real estate title issues that were committed in late 2005 by Governor Douglas to a Commission on Marketability of Title, which issued its preliminary report on December 15, 2005.

⁶ In re Shea Realty, Inc., 21 B.R. 790, 793 (Bankr. D.Vt. 1982); In re LH&A Realty Co., 57 B.R. 265, 268 (Bankr. D. Vt. 1986).

⁷ Further, even where a creditor obtains relief from stay, it is common for the bankruptcy court to condition relief on a requirement that the creditor submit an accounting after sale and remit any proceeds in excess of the debt to the estate.

⁸ Chapter 13 creates a separate federal law right to cure a default on a residential mortgage so long as the property has not been sold prior to the bankruptcy filing. 11 U.S.C. § 1322(c)(1).

⁹ As recited in the Second Circuit's decision reported at 284 F.3d 362 (2d Cir. 2002), the bankruptcy court in that case had applied the LH&A Realty rule to deny the creditor relief from stay, but the District Court had reversed, with that decision being affirmed by the Circuit Court.

¹⁰ VT. STAT. ANN. tit.12, § 4529 requires that "a certified copy of the judgment" be recorded in the land records. As a matter of practice, Superior Court clerks routinely issue as part of their certification of a foreclosure judgment a certification that no party has redeemed if that is the case. This has become known as a

Certificate of Non-Redemption. Even though some courts, like that in *Canney*, refer to the statutory requirement as recording of a Certificate of Non-Redemption, it is important to record both the Clerk's Certificate of Non-Redemption and the Judgment together in the land records.

¹¹ VT. STAT. ANN. tit.12, § 4530.

¹² 284 F.3d at 373-374.

¹³ The Chapter 7 trustee in *Canney* argued that the Section 362 stay should apply to prevent recording of a certified foreclosure decree and certificate of non-redemption because it affected the trustee's rights as a hypothetical judicial lien creditor under Section 544. But the Second Circuit rejected this argument, questioning whether a bankruptcy trustee could even invoke Section 544 powers as a way to invoke the automatic stay. However, if a trustee were to invoke Section 544 in order to establish an extended right to redeem, rather than obtain the benefits of the automatic stay, a different issue would be presented. Since the literal language of Section 544 would support treating a trustee as a subsequent attaching creditor that would acquire a right to redeem if a foreclosure decree and certificate of non-redemption is not filed in a timely fashion, *Canney* would not seem to be an impediment to assertion of extended redemption rights by a trustee. As discussed below, the Bankruptcy Court in Vermont, in a 2004 decision applying *Canney*, has suggested that a Chapter 13 trustee could indeed assert extended redemption rights, by virtue of the trustee's hypothetical judicial lien creditor status under 11 U.S.C. § 544, if a foreclosing creditor fails to comply with state law requirements for recording a foreclosure decree after redemption deadlines have expired.

¹⁴ 286 B.R. 275 (D. Vt. 2002).

¹⁵ 2004 WL 1661008 (Bankr. D.Vt. 2004).

¹⁶ Under 12 V.S.A. § 4530, the foreclosing mortgagee can record its decree in the land records at any time before any subsequent liens or interests in the property is acquired, and thereby prevent those lienholders from obtaining redemption rights. Section 4529 of the statute specifies a thirty day period for recording, but Section 4530 states that subsequent attaching creditors acquire redemption rights only if the decree is not recorded "prior to the acquiring of any interest in or lien on the lands by a purchaser, mortgagee, or attaching creditor." Thus, even if a foreclosing creditor records beyond the thirty day statutory period, but before any other liens arise, all redemption rights are cut off. But if a creditor misses the thirty day deadline under Section 4520 and does not record the decree before a bankruptcy filing, the trustee acquires of the rights of a hypothetical judicial lien creditor as of the petition date.

¹⁷ VT. STAT. ANN. tit.12, § 341(a).

¹⁸ Lakeview Farms, Inc. v. Enman, 166 Vt. 158 (1997).

¹⁹ The rulings of the lower courts are summarized in the Second Circuit's first opinion. Mortgage Lenders Network v. Sensenich (In re: Potter), 313 F.3d 93 (2d Cir. 2002)(Potter I).

²⁰ Mortgage Lenders Network v. Sensenich, 177 Vt. 592, 593 (2004).

²¹ The initial Supreme Court opinion, dated October 18, 2004, 15 Vt. L.W. 376, stating

incorrectly that the foreclosure decree had been recorded, was later withdrawn in response to the trustee's motion for reconsideration and replaced by the opinion reported at 177 Vt. 592 (Nov. 9, 2004). The Supreme Court apparently concluded that whether or not the decree had been recorded made no difference in determining whether a decree based on a defective mortgage cut off the rights of subsequent purchasers.

²² It is not at all clear how the acquisition of Section 544 rights by the trustee, which would only give the trustee redemption rights under state foreclosure law (12 V.S.A. § 4530), because a creditor has failed to cut off the rights of subsequent attaching creditors by failing to record the decree in a timely fashion, could give rise to a debtor's extended right to cure under Section 1322. In *Taylor*, the debtor still had a right to redeem when the petition was filed, so it is clear how the court concluded that this extant right of redemption under state law supported the right to cure under federal law. But if the debtor's right to redeem has been extinguished, and it is only the Chapter 13 trustee that acquires a right of redemption as a subsequent attaching creditor, it is not clear how this would support a debtor's right to cure absent some transfer of the trustee's Section 544 rights to the debtor.

²³ Potter I, 313 F.3d at 95.

²⁴ 328 B.R. 675 (Bankr. D.Vt. 2005)

²⁵ 512 U.S. 531 (1994).

²⁶ VT. STAT. ANN. tit.9, § 2281 et seq.

²⁷ 328 B.R. at 683-684.

²⁸ 336 B.R. 681 (Bankr. D.Vt. 2005).

²⁹ The statute of limitations for a fraudulent transfer claim like the one asserted in *Chase* is four years under 9 V.S.A. § 2293. The trustee in *Chase* also asserted a parallel claim under 11 U.S.C. § 548(a), which has a shorter two year statute of limitations. 11 U.S.C. § 548(a).

³⁰ The bill would include a definition of "value" as "fair market value less all reasonable expenses that would be incurred in selling the property." 